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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ALTON PACKAGING CORPORATION,
Petitioner,

v.

POLLUTION CONTROL BOARD
and
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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July 6, 1988

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QUESTION PRESENTED

This petition raises a question of whether the holder of a State environmental permit is entitled to notice and an opportunity to be heard, under the due process clause of the Fourteenth Amendment to the United States Constitution, before the State denies renewal of its permit.

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ALTON PACKAGING CORPORATION,
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POLLUTION CONTROL BOARD
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner[1] seeks a writ of certiorari to review an order of the Supreme Court of the State of Illinois in which it denied Alton's Petition for Leave to Appeal from the Illinois Appellate Court, Fifth District and an order of the Illinois Appellate Court.

OPINIONS AND DECISIONS BELOW

The Order Granting Stay Pending Appeal by the Supreme Court of the State of Illinois is reprinted at page

[1] Alton Packaging Corporation has been merged into Jefferson Smurfit Corporation, a publicly traded corporation. Jefferson Smurfit is affiliated with the Smurfit Group Limited and Container Corporation of America.

a-1 of the Appendix. The order of the Supreme Court of the State of Illinois denying petition for Leave to Appeal, No. 66437, is reprinted at page b-1 of the Appendix. The opinion of the Illinois Appellate Court, Fifth District, No. 5-86-0477, affirming the decision of the Pollution Control Board is reprinted beginning at page c-1 of the Appendix. The opinion of the Pollution Control Board, PCB 85-145, affirming the August 27, 1985 denial by the Environmental Protection Agency of application for renewal of an operating permit for its Alton Mill is reprinted beginning at page e-1 of the Appendix. The order of the Illinois Pollution Control Board denying motion for reconsideration is reprinted at page d-1 of the Appendix.

JURISDICTION

The order of the Supreme Court of the State of Illinois denying Alton's motion for leave to appeal was rendered April 7, 1988. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). This court has jurisdiction over this matter because the petition seeks review of the final judgment of the highest Illinois court in which relief can be had, and because the validity of Section 40 of the Environmental Protection Act is challenged on the basis that it is repugnant to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of laws.

Ill. Rev. Stat., ch. 111 1/2, § 1039(a) (1987):

(a) When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder. The Agency shall adopt such procedures as are necessary to carry out its duties under this Section. In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder. Except as otherwise provided in this Act, a bond or other security shall not be required as a condition for the issuance of a permit. If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations of this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:

(i) the Sections of this Act which may be violated if the permit were granted;

(ii) the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;

(iii) the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and

(iv) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued; except that this time period shall be extended to 180 days when (1) notice and oppor-

tunity for public hearing are required by State or federal law or regulation, or (2) the application which was filed is for any permit to develop a landfill subject to issuance pursuant to this subsection.

Ill. Rev. Stat., ch. 111 1/2, § 1040 (1987):

> (a)(1) If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. The Board shall give 21 day notice to any person in the county where is located the facility in issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of general circulation in that county. The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Section 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner.
>
> * * *
>
> (d) In reviewing the denial or any condition of a permit issued by the Agency pursuant to rules and regulations adopted under subsection (d) or (e) of Section 9.1 of this Act, the decision of the Board shall be based exclusively on the record before the Agency including the record of the hearing, if any, held pursuant to paragraph (f)(3) of Section 39 unless the parties agree to supplement the record.

STATEMENT OF THE CASE

This petition arises from the Environmental Protection Agency's (the "Agency") denial of an application for renewal of the operating permit for the two main boilers (the "Boilers") used to operate the Alton Packaging Corporation ("Alton") Mill in Alton, Illinois. The permit denial was subsequently affirmed by the Pollution Control Board (the "Board") and the Illinois Appellate Court,

Fifth District. The petition arises from an order of the Supreme Court of Illinois denying Alton's petition for leave to appeal.

The mill manufactures paperboard from recycled paper. The mill employs over 350 people and produces in excess of 600 tons of paperboard per day.

The Agency and the Board were established under the Environmental Protection Act (the "Act"), Ill. Rev. Stat., ch. 111 1/2, § 1001 *et seq.* (1987). Air emission sources such as the Boilers are required to have a permit under the regulations of the Board. Therefore, Section 39(a) of the Act requires that Alton obtain an operating permit from the Agency for the Boilers. Ill. Rev. Stat., ch. 111 1/2, §§ 1004(g), 1039(a) (1987). Section 39(a) requires the Agency to issue a statement of reasons in the event it denies a permit. Section 40 provides for a Board review of permit denials. The Board's review must be based exclusively upon the Agency record under Section 40 of the Act as interpreted by the Illinois Courts. Ill. Rev. Stat., ch. 111 1/2, § 1040 (1987). Section 41 provides for judicial review of a Board Decision in the Illinois Appellate Court. Ill. Rev. Stat., ch. 111 1/2, § 1041 (1987).

On January 25, 1983, Alton filed a routine application with the Agency for renewal of the operating permit for the Boilers. As the rules of the Board provide, this application certified that the information supplied in previous successful applications remained accurate. 35 Ill. Adm. Code, § 201.157.

The Agency did not rule on Alton's application within 90 days as provided by Section 39(a) of the Act. Instead, the parties agreed to postpone the decision on the permit. Consequently, the Agency did not rule on the permit application until August 27, 1985, at which time it denied the permit. The denial was based on allegations that the Boilers caused a violation of the sulfur dioxide air quality standard in Alton, Illinois in November, 1984.

Prior to the Agency's August 27, 1985 denial of the permit, Alton received no notice from the Agency that it intended to act on the permit. On December 20, 1984, the Agency completed an air quality bulletin in which the Agency contended that Alton contributed to the alleged November, 1984 violation. The bulletin was neither published nor sent to nor received by Alton. An Agency study completed in May, 1985 stated that the Boilers had been the "likely cause" of the alleged November, 1984 violation.

On July 22, 1985, the Agency sent Alton a notice of noncompliance regarding the alleged violations, along with the May, 1985 study, and demanded that Alton respond within fifteen (15) days. This notice is the first step of an enforcement action under Section 31(d) of the Act. Ill. Rev. Stat., ch. 111 1/2, § 1031(d) (1987). The notice did not in any manner refer to the Agency's intention to deny the permit.

The Board's Rules specifically require the Agency to notify a permit applicant if the Agency believes an application lacks sufficient information. 35 Ill. Adm. Code 201.158. Prior to the permit denial, however, the Agency did not notify Alton that the Application contained insufficient information. When Alton filed its application, it had no reason to believe that additional information was required. In fact, Alton had no notice of the charges that the Agency was making until it received the Agency's August letter denying the permit. Consequently, Alton was provided with no opportunity to present evidence to rebut the Agency's charges prior to the August 27, 1985 permit denial.

Alton then filed an appeal with the Pollution Control Board pursuant to Ill. Rev. Stat., ch. 111 1/2, § 1040 (1987). *Alton Packaging Corp. v. Environmental Protection Agency*, PCB 85-145 (April 24, 1986). In such an appeal the applicant has the burden of proving to the Board that its operations will not result in a violation of the Act

or the Board's rules. Ill. Rev. Stat., ch. 111 1/2, § 1040 (1987); *Environmental Protection Agency v. Pollution Control Board*, 138 Ill. App. 3d 550, 46 N.E.2d 293 (1985). Section 40, as interpreted by the Illinois courts, requires that the hearing in a permit appeal be based exclusively on the record before the agency. Under this interpretation of Section 40, Alton was given the limited opportunity to cross-examine Agency witnesses to test the information relied upon by the Agency, *Environmental Protection Agency v. Pollution Control Board* (1986), 115 Ill. 2d 65, 503 N.E.2d 343, but was specifically denied the opportunity to present evidence that was not part of the Agency record. Consequently, Alton had no opportunity to present evidence before the Board to refute the Agency's charges. Since the applicant bears the burden of proving its right to an operating permit, Ill. Rev. Stat. 1983, ch. 111 1/2, § 1039(a) (1987), Alton was presented with the burden of proof for an issue on which it was denied the opportunity to present evidence. Based on the limited record, the Board affirmed the denial.

Subsequently, Alton appealed the Board's Decision to the Appellate Court of Illinois, Fifth District. Alton Packaging Corp. v. Pollution Control Board and *Environmental Protection Agency*, 162 Ill. App. 3d 731, 561 N.E.2d 275 (1987). In its briefs and at oral argument, Alton argued that the Board had erred in its interpretation of Section 40 and that under recent decisions a permit appeal to the Board should not be restricted to the Agency record. The Appellate Court rejected these arguments and held that Section 40 restricted permit appeals solely to the record before the Agency, even in a case such as Alton's where the applicant, prior to denial, had been given no notice of, and no opportunity to rebut or respond to, the basis for the Agency's action. The Appellate Court affirmed the Decision of the Board, finding that Alton had failed to meet its burden of proof before the Board.

After a petition for rehearing was denied by the Appellate Court, Alton, on January 11, 1988 petitioned the Supreme Court of the State of Illinois for Leave to Appeal. The petition was denied on April 7, 1988, No. 66437, prompting this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Illinois Environmental Protection Act, Ill. Rev. Stat., Ch. 111 1/2, § 1001 *et seq.*, in its provisions for the issuance of environmental operating permits, violates the permit applicant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The Act denies due process because it allows the State to take away or to refuse to renew permits without sufficient notice and without an opportunity for a fair hearing at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

Permit holders such as Alton have a valuable property interest in the continuation of their operating permits, to which they have a claim of entitlement. Alton was deprived of this property interest without notice and without opportunity for a hearing. Thus, this Court should grant this writ in order to prevent State agencies from arbitrarily depriving permit holders of their valuable property interests in permits without due process of law.

On August 27, 1985, by a letter from the Agency, Alton was denied an operating permit for the operation of boilers essential to the viability of the Alton mill. Alton was not notified of the forthcoming permit denial, or of the reasons for the denial at any time prior to the denial letter. The Agency denied Alton its operating permit without providing notice or the opportunity for a hearing.

Moreover, the Agency's failure to provide Alton with due process of law prior to refusing to renew its operating permit was not remedied by the post-deprivation opportunity for a "hearing" before the Pollution Control Board. That proceeding, in which Alton had the burden of proving its right to the permit, was limited to the record before the Agency. Thus Alton was deprived of the opportunity to present evidence to challenge the Agency's findings and carry that burden. Consequently, Alton was never given an opportunity to present its side of the story through the introduction of evidence to dispute the Agency's charges.

B. Basic Requirements of Due Process

The due process Clause of the Fourteenth Amendment prohibits a State from depriving a person of property without reasonable notice and the opportunity for a fair and impartial hearing at a reasonable time and in a reasonable manner. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). These requirements apply to all agencies, departments, or officials of the state, whether legislative, judicial, or executive, *Buchalter v. New York*, 319 U.S. 427 (1943); *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673 (1930); *Georgia Power Co. v. Decatur*, 281 U.S. 505 (1930); *Phillip Wagner, Inc. v. Leser*, 239 U.S. 207 (1915); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913), and to administrative as well as to judicial proceedings. *Galvan v. Press*, 347 U.S. 522 (1954); *Shaughnessy v. United States*, 345 U.S. 206 (1953); *Kwang Hai Chew v. Colding*, 344 U.S. 590 (1953); *Lichter v. U.S.*, 334 U.S. 742 (1948). Thus, the requirements of due process apply to proceedings of the Environmental Protection Agency and Pollution Control Board. The Illinois Appellate Court and the United States District Court for the Northern District of Illinois have so held. *Mathers v. Pollution Control Board*, 107 Ill. App. 3d 729, 438 N.E.2d 213 (1982); *Martell v. Mauzy*, 511 F.Supp. 729, 739 (N.D.Ill. 1981).

C. Protected Interest in Operating Permit

Procedural due process requirements apply whenever governmental decisions infringe property or liberty interests protected by the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Alton has such a property interest in a government benefit. For the purposes of due process, a property interest in a government benefit must depend on more than a unilateral expectation, abstract need, or mere desire. Rather, a person must have a legitimate claim of entitlement to a specific benefit before the Fourteenth Amendment's protections apply. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Persons holding a government permit pursuant to specific State regulations have a claim of entitlement to continuation of those permits. In the present case, Alton has a legitimate claim of entitlement to the operating permit for the Boilers. This entitlement was created and is defined by the existing rules of the Pollution Control Board and Section 39(a) of the Act. Ill. Rev. Stat., ch. 111 1/2, § 1039 (1987). *See*, 35 Ill. Adm. Code § 201.160. These provisions set out specific objective criteria which, if met, entitle an applicant to a permit.

The guarantees of due process attach in cases of renewals of government benefits such as permits. This case is analogous to that in *Perry v. Sindermann*, 408 U.S. 593 (1972), where the defendant had, without a hearing, refused to renew the plaintiff's expired one-year college teaching contract, thereby refusing to grant the plaintiff a new benefit identical to the expired one. This Court held that despite the lack of a formal tenure policy, the plaintiff was entitled to prove the existence of a protected property interest in his employment stemming from official policy statements and guidelines which implied some form of tenure. The plaintiff was held to have a right to a hearing "where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

Here, as in *Perry v. Sindermann*, the operating permit applicant sought a "new" benefit to supercede the "expiring" benefit of the old operating permit. This does not, however, foreclose Alton's claim of entitlement to the operating permit. For here, as the Court said in *Perry:*

> "property" interests subject to due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understanding." . . . A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

408 U.S. at 601.

Illinois law specifically establishes a permittee's entitlement to a renewed permit. Under Illinois law, a permittee is entitled to renewal of its permit if certain objective criteria are met; that is, if operation of the source will not cause a violation of the Act or the Board's regulations, the Agency has a statutorily compelled "duty" to issue a permit. Ill. Rev. Stat. ch. 111 1/2, § 1039 (1987) ("[I]t shall be the duty of the Agency to issue such permit upon proof that [the source] will not cause a violation of the Act or of regulations hereunder.") This Court has held that when an agency has a duty to issue a permit based on specified criteria, a protected interest arises under the Constitution. *Hewitt v. Helms*, 459 U.S. 460, 470-72 (1982).

The United States District Court for the Northern District of Illinois has specifically held that a person holding a permit under the Illinois Act has a protected property interest in that permit. *Martell v. Mauzy*, 511 F. Supp. 729, 739 (N.D.Ill. 1981). In *Martell*, the Agency denied plaintiff an operating permit for a waste disposal facility under Section 39(a) of the Act based solely on unadjudicated allegations. The district court found that the plaintiff had been denied an operating permit without being afforded due pro-

cess of law and held that he was entitled to an operating permit until he could be afforded a full hearing. *Id.* at 744.

In much the same way, Alton was denied an operating permit based upon unadjudicated allegations of wrongdoing, *i.e.*, that it caused an air quality violation.

Further, the operating permit for the Boilers is crucial to the continued viability of the Alton Mill. By its dependence on the operating permit, Alton is, as the *Martell* court noted, effectively a licensee who depends on its license for its livelihood. *Id.* at 739. Thus, Alton is also analogous to a licensee whose license is "essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 539 (1871). In *Bell*, the Court held that a driver's license "may not be taken away without the procedural due process required by the Fourteenth Amendment." *Id.* Thus, because Alton has a legitimate claim of entitlement to an operating permit and the permit is essential to its paperboard business, it has a protected property interest which the State of Illinois may not take away without due process of law.

D. Inadequate Notice Before Agency

Procedural due process requires that parties whose rights are to be affected by governmental action are entitled to be heard; and in order to enjoy that right they must first be notified. Consequently, notice is an essential element of due process. *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972). The notice must be reasonably calculated to apprise the interested party of the pendency of the action and afford the party an opportunity to present its objections. *Covey v. Somers*, 351 U.S. 141 (1956).

The Agency failed to provide Alton with notice of its impending action prior to the denial of its permit. The Agency did not notify Alton in the summer of 1985 that it intended to act on Alton's 1983 permit application.

The August 27, 1985 letter from the Agency informing Alton of denial of the permit was Alton's first notice of the Agency's action and of the reasons for denial. The Agency's Air Quality Bulletin of December 20, 1984 was insufficient as notice since it was never published or sent to or received by Alton. Thus, the bulletin was clearly not reasonably calculated to apprise Alton of the pendency of the action against it. *See, Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

An Agency letter of July 22, 1985 serving Alton with notice of non-compliance was also insufficient to notify Alton of the action pending on its permit application. The letter stated only that non-compliance with the Board's regulations might result in enforcement action. This is the first procedural step in bringing an enforcement action. *See*, Ill. Rev. Stat., ch. 111-1/2, § 1031(d) (1987). It did not indicate in any way that it was connected with Alton's permit application. Due process requires that notice of the pendency of the action affecting a property interest be provided. In the administrative context, due process requires that interested parties be given reasonable opportunity to know claims of adverse parties, the consequences which might arise from those claims, and an opportunity to meet them. *North Alabama Express, Inc. v. United States*, 585 F. 2d 783 (5th Cir. 1978); *In Re Estate of Levin*, 135 Ill. App. 3d 386, 482 N.E.2d 409 (1985). Clearly, the letter did not inform Alton of the possible consequences at stake, that is, the denial of its permit.

Furthermore, the July 22, 1985 letter was not sufficient notice because it was not timely. Procedural due process requires that the notice must be given a sufficient length of time prior to government action to afford opportunity to be present. *Roller v. Holly*, 176 U.S. 398 (1900); *Missouri ex rel. Hurtwitx v. North*, 271 U.S. 40 (1926). The amount of time required to satisfy due process is determinable only from the facts and circumstances of each case. *Id.*

Alton was given only fifteen (15) days to respond to the Agency's letter. Due process requires that one be given notice of charges against him a reasonable time before the government takes action on those charges. *Miller v. City of Mission, Kansas*, 705 F. 2d 368, 372 (10th Cir. 1983). Given the complexity of the air dispersion modeling studies, which Alton would have needed to conduct to respond properly to the Agency's allegations, fifteen days constitutes grossly insufficient notice. The Agency record shows that it took the Agency more than six (6) months to prepare its rudimentary May, 1985 study. Thus, the July 22, 1985 letter was insufficient in its timing as well as its content.

E. Inadequacy of Board Hearing

Subsequent to the Agency's denial of the operating permit Alton appealed to the Board pursuant to Section 40 of the Act. The "hearing" before the Board failed to remedy the lack of procedural due process accorded Alton by the Agency. Although the Board provided Alton with notice and the opportunity for a "hearing," this hearing was totally inadequate. Permit appeal hearings before the Board are limited to the record before the Agency under Section 40 of the Act, as interpreted below by the Illinois Appellate Court. *Alton Packaging Corp. v. Pollution Control Board and Environmental Protection Agency*, No. 5-86-0477, Ill. App., Fifth District, *slip op.* (September 25, 1987) at p. c-8 of the Appendix. *See also, Environmental Protection Agency v. Pollution Control Board*, 118 Ill. App. 3d 772, 455 N.E.2d 188 (1983). Consequently, Alton was prohibited from presenting relevant evidence at the hearing before the Board to refute the Agency's charges. An essential element to the due process right to a hearing is the right to present evidence. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Trucking Asso. v. United States*, 326 U.S. 77 (1945); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937). Since the hearing before

the Board did not allow Alton to present evidence, it did not meet the minimum requirements of due process.

CONCLUSION

Permit holders under Illinois law are not given notice and the opportunity to be heard at a reasonable time and a reasonable manner before being denied a permit. In the proceedings below, Alton was deprived of its permit without notice and the opportunity to be heard. The Illinois courts have refused to reinstate Alton's permit. This refusal is contrary to the holdings of this Court as discussed above. Therefore, this Court should granted a writ, reverse the holdings of the lower courts, and order the Agency to reinstate Alton's permit until Alton is given notice and an opportunity to be heard.

Furthermore, this Court should grant a writ to resolve the important question of constitutional law raised in this proceeding, that is, whether States must give a permittee notice and an opportunity to be heard before refusing to renew valuable environmental permits.

Respectfully submitted,
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APPENDIX A

No. 66437

In The
Supreme Court of Illinois

Alton Packaging Corporation, *Petitioner* *v.* **Pollution Control Board, et al.,** *Respondents*	Appeal from Appellate Court Fifth District AC5-86-0477 PCF 85145

ORDER

This matter has come for consideration upon the motion of petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

FILED
May 9 - 1988
SUPREME COURT CLERK

APPENDIX B

In The

Supreme Court of Illinois

April 7, 1988

Mr. Richard J. Kissel
Martin, Craig, Chester & Sonnenschein
55 West Monroe-S1200-Chicago, IL 60603

In re: Alton Packaging Corporation, petitioner v. Pollution Control Board, et al., respondents. No. 66437

Dear Sir:

The Supreme Court today DENIED the petition for leave to appeal filed in the above cause.

Very truly yours,

Clerk of the Supreme Court

JH: jae
cc: All attorneys
of record

APPENDIX C

No. 5-86-0477

In The
Appellate Court of Illinois
Fifth District

ALTON PACKAGING CORPORATION,
Petitioner-Appellant,

v.

THE POLLUTION CONTROL BOARD and ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondents-Appellees.

Appeal from Decision of Pollution Control Board.

Justice Lewis[1] delivered the opinion of the court:

Alton Packaging Corporation (Alton) appeals from an order of the Pollution Control Board (Board), in which the Board affirmed the Environmental Protection Agency's (Agency) denial of Alton's application for renewal of an operating permit at its mill in Alton, Illinois. The Agency had denied Alton's application for renewal of the permit because it had found that certain boilers at Alton's mill had been the major contributors to a violation of the Agency's sulfur dioxide standard for the area during 1984 and had concluded that these boilers might cause violations in the future. On appeal from the Board's order affirming the Agency's denial, Alton contends that the Board's findings that there was a violation of the Agency's sulfur dioxide

[1] Justice Lewis replaced Justice Jones who retired after the cause was taken under advisement.

standard in Alton in November 1984 and that continued operation of the Alton mill might cause that standard to be exceeded in the future were contrary to the manifest weight of the evidence. We affirm.

Alton is a fully integrated company engaged in the manufacture and sale of paper board and paper board packaging products. In its manufacture of paper board products, Alton operates a mill located at Alton, Illinois, which requires the use of steam produced by boilers. Two of these boilers, Nos. 6 and 7, are pulverized, wet bottom boilers, in which coal is pulverized to a fine powder and blown into the boilers. Exhaust air from these boilers is eventually vented into the atmosphere through two large stacks, which contain no devices to control sulfur dioxide emissions. It is these boilers that are the subject of this permit appeal.

On January 25, 1983, Alton filed an application with the Agency for renewal of its operating permit for the boilers in question. In a related proceeding, Alton, on April 23, 1983, filed a petition for variance and site specific relief from the Board's Rule 204(f) (now codified as 35 Ill. Adm. Code §214.141), which had been revised to establish an emission limitation for sulfur dioxide of 1.8 pounds per million BTU (lbs/mmbtu). The Board subsequently dismissed the variance and site specific proceeding for lack of prosecution, but, upon appeal to this court (see *Alton Packaging Corp. v. Pollution Control Board* (1986)), 146 Ill. App. 3d 1090, 497 N.E.2d 864), the cause was reinstated and application of the revised emission limitation to the Alton mill was stayed pending the outcome of the variance and site specific proceeding.

In November 1984, following Alton's application for renewal of its operating permit, the Agency recorded two excursions or exceedances of the 24 hour primary ambient air quality standard for sulfur dioxide at its monitor in Alton, Illinois. Pursuant the Board regulation (codified at 35 Ill. Adm. Code § 243.122), more than one excursion from

this standard of 0.14 parts per million (ppm) in a one year period constituted a violation. The two excursions occurred on November 6 and 7, 1984, with a 24 hour average reading of 0.148 ppm, and on November 25 and 26, 1984, with a reading of 0.159 ppm. In December 1984 the Agency issued an air quality bulletin identifying Alton as a primary contributor to these excursions, and, in May 1985, the Agency completed a modeling study which confirmed that Alton's boilers had been the "likely cause" of the November 1984 violation of the air quality standard for sulfur dioxide in the Alton area.

On August 27, 1985, the Agency denied Alton's request for renewal of its operating permit, setting forth two reasons. The first reason, that the boilers in question had an average emission rate of 4.9 lbs/mmbtu, in excess of the newly revised emission limit of 1.8 lbs/mmbtu, was subsequently rendered inapplicable when the variance proceeding was reinstated and the applicability of the new limit was stayed as to Alton. The second reason for denial was stated as follows:

> "2. The Agency's ambient SO2 monitor in Alton recorded a violation of the primary 24 hour SO2 standard during 1984. Based upon a recent study performed by the Agency, Boilers 6 and 7 appear to have been the major contributor to this violation. Boilers 6 and 7 thus may cause violations of 35 Ill. Adm. Code 201.141 and 243.122(a)(2)."

Alton then filed an appeal with the Board from the Agency's denial pursuant to section 40 of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1040). In a hearing before the Board, Alton called two Agency employees as adverse witnesses. John Shrock, an environmental protection specialist with the Agency testified that he had prepared the Agency's May 1985 Study with regard to the alleged excursions of November 1984. He stated that it was not the purpose of this report to predict future excursions but only to determine

the major contributors to the reported excursions. Upon examination by the Agency, Shrock testified that similar excursions may be possible in the future if Alton were allowed to operate at the limits they were operating at during the previous excursions, since the weather conditions present on those dates were not unusual.

Alton further called David Kolaz, manager of the Agency's Ambient Air Quality Monitoring section. Kolaz testified concerning the range of accuracy of the Agency's monitors, explaining the procedures and requirements for recalibrating its monitors. Upon examination by the Agency, Kolaz described the precision and accuracy checks that are performed on the Agency's monitors and stated that under United States Environmental Protection Agency (USEPA) guidelines, the recorded values were not to be adjusted based upon accuracy and precision checks, but were to be reported as measured on the Agency's monitors.

As a final witness the Agency called Patrick Dennis, a senior analysis engineer for the Agency, who had reviewed Alton's permit application and recommended that it be denied. Dennis explained the reasons given by the Agency for the permit denial and stated that either reason alone would have been sufficient to recommend denial. He further stated that Alton had provided no information to the Agency to show that operation of its boilers would not cause future exceedances of the air quality standard for sulfur dioxide.

Upon cross-examination by Alton, Dennis testified that he had been aware of a modeling study prepared by *Murray and Trettel* and submitted by Alton as part of the variance proceeding but stated that this study had not been considered in the context of the permit proceeding because it had not been prepared according to USEPA guidelines and because it had been part of the variance proceeding that was dismissed by the Board. Dennis stated that he had placed no reliance on the Murray and Trettel study,

which was not included in the Agency record in the permit appeal, but had based his recommendation to deny Alton's permit request on the modeling study performed by the Agency to determine the source of the two excursions in November 1984, as well as information provided by Alton as to coal usage.

Following the hearing, the Board, on April 24, 1986, affirmed the Agency's denial of the operating permit for Alton's mill. In stating the basis for its decision the Board found, contrary to Alton's contentions regarding the accuracy of the Agency's recorded excursion on November 6 and 7, 1984, that there had been an excursion on that date and that Alton had failed to show that the Agency's monitor by which the November 1984 excursions were recorded was faulty. The Board further found that

> "based on the information received form the excursion study [of May 1985], the Agency could reasonably conclude that Alton's boilers may cause a violation of 35 Ill. Adm. Code 201.141 and 243.122(a)(2)."

The Board noted that while Alton had questioned the predictive capacity of the Agency's excursion study, it had "offer[ed] no data to suggest that the Agency's conclusions were unreasonable."

The Board continued:

> "In this permit appeal, the burden is not on the Agency to prove that a violation will occur in the future. Rather, the burden is on Alton to prove that a violation will not occur in the future. Alton has not provided the Board with any information which would enable the Board to conclude that a violation of the primary SO2 24-hour standard will not occur in the future. Based on the record before the Agency, the Board finds that the information provided by Alton to the Agency fails to demonstrate that issuing a permit for Alton's mill will not cause a violation of the Act and Board regulations. Therefore, the Board affirms the Agency's

denial of a permit for Alton's mill."

On direct appeal to this court (see Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1041), Alton contends that the Board's decision affirming the Agency's permit denial was contrary to the manifest weight of the evidence and should be reversed. In particular, Alton maintains that there was an insufficient basis for the Board to conclude that continued operation of Alton's mill may cause future violations of air quality standards in view of testimony at the hearing that the Agency's May 1985 modeling study was no intended to be predictive of future violations and testimony that the alleged excursion of November 6 and 7, 1984, fell within the margin of error of the Agency's monitor. Alton asserts, therefore, that the evidence failed to support the second reason given in the permit denial and that the Agency's denial should be reversed.

Section 39(a) of the Act (Ill. Rev. Stat. 1983, ch. 111 1/2, par. 1039(a)), under which Alton's permit application was made, states in pertinent part:

> When the Board has by regulation required a permit for the * * * operation of nay type of facility * * *, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit *upon proof by the applicant that the facility * * * will not cause a violation of this Act or of regulations hereunder."*
>
> (Emphasis added.)

Under section 39, Alton, as permit applicant, had the burden of showing that issuance of a permit for operation of its mill would not cause a violation of the Board's air quality standard for sulfur dioxide. Upon appeal to the Board from the Agency's denial of such permit, the burden of proof was again upon Alton. Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1040 (a) (1); see *Environmental Protection Agency v. Pollution Control Board* (1983), 118 Ill. App. 3d 772, 455 N.E.2d 188 (hereafter *Alburn).*

In the hearing to determine whether Alton had met his burden, the Board considered testimony elicited by Alton from the Agency's employees regarding the accuracy of the recorded excursions in the Alton area during November 1984. Alton, in its examination of these employees, sought to discredit the Agency's measuring and recording methods. The Board, however, rejected Alton's assertions that the recorded measurement of November 6 and 7 did not constitute an excursion and found that there had in fact, been an excursion. The Board thus determined that Alton had failed to carry its burden of refuting the factual basis for the Agency's conclusion that there may be a violation of Board regulations in the future. the Board further noted that while Alton had questioned the predictive capacity of the May 1985 modeling study, this study was an adequate basis for the Agency's conclusion that Alton was a major contributor to the excursions in question.

Upon appeal, now, from the Board's decision to this court, Alton has the heavy burden of showing that the Board's decision affirming the Agency's denial was contrary to the manifest weight of the evidence. (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1401 (b).) While the Board was required to determine, based upon the evidence in the hearing before it, whether the permit should issue, this court, in reviewing the Board's decision, must evaluate the evidence in the record and determine whether the Board's findings were contrary to the manifest weight of the evidence. (*Environmental Protection Agency v. Pollution Control Board* (1986), 115 Ill. 2d 65, 503 N.E.2d 343 (hereafter *Waste Management, Inc.*) That a different conclusion might be reasonable is insufficient; the opposite conclusion must be evident. (*See Willowbrook Motel v. Pollution Control Board* (1985), 135 Ill. App. 3d 343, 481 N.E.2d 1032.) This court, thus, must not reweigh the evidence nor substitute its judgment for that of the Board. *Waste Management, Inc.*

We have so examined the record before the Board and have concluded that there was sufficient evidence to support the Board's findings. Notwithstanding Alton's attempts to establish the unreliability of the Agency's recorded measurements, there was evidence that the Agency's monitor was operating satisfactorily and that the measurements were properly reported without adjustment as required by USEPA guidelines. In light of the evidence of Alton's role in the violation of November 1984 and Alton's failure to show that no such violation would occur in the future, the Board was justified in upholding the Agency's permit denial. We, accordingly, affirm the decision of the Board.

We note in passing Alton's alternative argument that the Board's decision should be reversed and remanded for further hearing to afford Alton the opportunity to introduce new evidence that was not part of the record before the Agency. Alton maintains that the decision of *Environmental Protection Agency v. Pollution Control Board* (1985), 138 Ill. App. 3d 550, 486 N.E.2d 293, which has since been affirmed in *Waste Management, Inc.* referred to above, changed the law with respect to the requirements of the hearing before the Board in a permit appeal so that the parties are no longer limited to the record before the Agency but are entitled to a hearing *de novo* before the Board with the admission of new evidence. It is Alton's position that it should have a new hearing in which to submit evidence of its own modeling study prepared by Murray and Trettel even though this study had not been presented to the Agency in the permit proceeding.

We find no merit in Alton's position, because, rather than changing the law regarding the admission of evidence in Board hearings, it appears that the *Waste Management, Inc.* decisions merely restated the law regarding the standard of proof applicable in such hearings. while both the appellate and the supreme court opinions dis-

cussed the opportunity afforded the permit applicant, during the Board hearing, to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the receipt of testimony "to test the validity of the information [relied upon by the Agency]" (115 Ill. 2d 65, 70, 503 N.E.2d 343, 345), the courts' language should not be construed to allow the supplementing of the record with new matter not considered in the Agency's denial of the permit application. (*Cf. Alburn:* Board's review of Agency's permit denial limited to consideration of material relied upon by Agency.) We believe Alton was afforded an adequate opportunity here to challenge the reasons given by the Agency for its permit denial and we, accordingly, find no basis upon which to remand the case for further hearing.

For the reasons stated in this opinion, we affirm the decision of the Board.

AFFIRMED.

KARNS, P.J.,
and KASSERMAN, J., concur.

APPENDIX D

ILLINOIS POLLUTION

CONTROL BOARD

June 20, 1986

ALTON PACKAGING CORPORATION,

Petitioner,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon a May 29, 1986 motion for reconsideration filed on behalf of the Alton Packaging Corporation and a June 9, 1986 response filed on behalf of the Illinois Environmental Protection Agency. In its motion Alton admits that its "arguments are all set forth in previous briefs filed with the Board in this matter." That being the case, and since Alton has not persuaded the Board that it "has clearly erred in assessing what Alton was required to demonstrate to the Agency," the motion is hereby denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the _____day of _____, 1986 by a vote of _____.

DOROTHY M. GUNN, Clerk
Illinois Pollution Control Board

APPENDIX E

ILLINOIS POLLUTION

CONTROL BOARD

April 24, 1986

ALTON PACKAGING CORPORATION, *Petitioner,* *v.* **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,** *Respondent.*	PCB 85-145

MR. RICHARD KISSEL, MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED ON BEHALF OF PETITIONER.

MR. WILLIAM INGERSOLL APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a permit appeal filed on October 1, 1985 on behalf of Alton Packaging Corporation (Alton). Alton requests that the Board reverse the August 27, 1985 decision by the Illinois Environmental Protection Agency (Agency) denying Alton's application for renewal of an operating permit for its Alton mill.

Alton is a fully integrated company in the pulp and paper industry engaged in the manufacture and sale of paperboard and paperboard packaging products which is headquartered in Alton, Illinois. Alton operates a mill in Alton, Illinois which employs about 350 people and produces approximately 600 tons of paperboard per day which is then converted into paperboard manufacturing products for corrugated shipping containers. In the production of

paperboard products, Alton utilizes boilers to produce the stream required for heating and process use. Two of these boilers, Boilers 6 & 7, are the subject of this permit appeal. (Pet. Brief pp. 1-2).

Boilers 6 & 7 are pulverized, wet bottom boilers. Coal is pulverized to a fine powder and blown into the boilers. Ash is both emitted through the vented air as well as collected in the wet ash pit. The exhaust air from the boilers passes through mechanical collectors (multi-clones) and then through electrostatic precipitators and then vented to the atmosphere through two separate 192-foot stacks. There is no control device to deal with SO_2 emissions. When needed, low sulfur coal is burned to comply with applicable emission limits for SO_2. (Pet. Brief p. 2).

On January 21, 1983, Alton filed a renewal permit application with the Agency for its Alton mill. Alton waived the 90-day decision period until the Board issued a final order in PCB 83-55 (site-specific rule) and PCB 83-49 (variance). The Board dismissed these proceedings on August 1, 1985. The Agency denied Alton's permit application on August 27, 1985 for the following reasons:

1. Based upon information submitted to the Agency, Boilers 6 and 7 presently emit sulfur dioxide at the average rate of 4.9 lbs per million Btu, an amount in excess of Btu of 35 Ill. Adm. Code 214.141.

2. The Agency's ambient SO_2 monitor in Alton recorded a violation of the primary 24 hour SO_2 standard during 1984. Based upon a recent study performed by the Agency, Boilers 6 and 7 appear to have been the major contributor to this violation. Boilers 6 and 7 thus may cause violations of 35 Ill. Adm. Code 201.141 and 243.122(a) (2).

The first ground for the Agency's denial is not presently at issue. Alton filed a petition for variance (PCB 83-49) within 20 days after the effective date of the rule

which established the 1.8 lbs/mmBtu SO_2 emission limitation, thereby staying applicability of this emission limitation pursuant to Section 38 (b) of the Environmental Protection Act. The Board subsequently dismissed the variance petition and the Agency contended that the stay was no longer in effect. However, Alton appealed the Board's decision to the appellate court which granted Alton's motion to stay the applicability of the 1.8lbs/mmBtu SO 2 emission limitation to Alton's mill. Therefore, the Agency's first ground for denial is not presently applicable and will not be considered.

Concerning the second ground for denial, the Agency's ambient SO_2 monitor in Alton recorded two excursions from the primary SO_2 24-hour standard in November 1984. (The primary 24-hour ambient air quality standard for SO_2 is 0.14 ppm). The first occurred during a 24-hour period on November 6 and 7. During this period, the maximum 24-hour average was 0.148 ppm. The second occurred during a 24-hour period on November 25 and 26. During this period, the maximum 24-hour average was 0.159 ppm. A violation of the primary SO_2 24-hour standard occurs when two excursions from the standard occur within a one-year period. The Agency conducted an excursion study to determine the major contributor(s) to the violation. The excursion study determined that Alton's Boilers 6 and 7 appear to have been the major contributor to the violation. Thus, the Agency concluded that Boilers 6 and 7 may cause violations of 35 Ill. Adm. Code 201.141 and 243.122 in the future and denied Alton's permit request.

Alton's position is that whether or not it was a contributor to the violation of the primary SO_2 24-hour standard is not a proper basis up on which the Agency can deny a permit; rather, the Agency must have in the record that this will occur in the future and the record does not contain that. (R. p. 9). Alton supports its position by questioning the accuracy of the recorded excursion on Novem-

ber 6 and 7. Alton contends that the November 6 and 7 excursion was not an excursion because the range of accuracy of the monitored readings could range, based on a 95% confidence interval, anywhere from 9% too low to 5% too high. Furthermore, Alton contends that the November 6 and 7 excursion may have been lower since the precision check of the monitor before the recorded excursion indicated that the recorded sample was 5.5% higher than what the real value was. Lastly, Alton contends that the Agency's excursion study was not predictive of the future and, consequently, the Agency could not determine whether the operation of Alton's boilers would in the future cause a violation of the primary SO_2 24-hour standard. (Pet. Brief pp. 7-10).

The Agency responds to these arguments by asserting that the November 6 and 7 excursion was in fact an excursion. The Agency asserts that the employee who testified on the range of accuracy was merely expression his staistical confidence level and that under USEPA guidelines the reported data is not to be corrected. The Agency also contends that the precision check indicating that the monitor was recording slightly higher readings does not affect the accuracy of the reported data. This just means that the baseline reference had drifted above zero and the drift had corrected itself before the November 6 and 7 excursion. (R. p 50). Lastly, the Agency employee, based on his expertise, concluded that future excursions were possible if Alton were allowed to continue operations as they were since the meteorological conditions during the excursions were not unusual and other SO_2 sources which would normally be expected to impact the monitor were not operating or operating at well below allowable limits. (Ag. Brief pp. 7-10).

The issue to be addressed by the Board in this permit appeal is whether the information provided by Alton to the Agency sufficiently proves that issuing a permit for

Alton's mill will not cause a violation of the Act and Board regulations. This issue is to be decided by the Board based on the record before the Agency when it made its decision. Section 40 of the Act places the burden of proof in a permit appeal on the petitioner to show that the Agency's decision was wrong. For the following reasons, the Board finds that Alton has not met this burden and affirms the Agency's denial of an operating permit for Alton's mill.

Alton's position in this permit appeal centers on the impropriety of the Agency's data which were used to determine that the November 6 and 7 excursion was in fact an excursion; and that Alton's boilers may in the future cause a violation of 35 Ill. Adm. Code 201.141 and 243.122(a) (2). The Board is not persuaded by any of Alton's arguments. Specifically, the Board finds that the November 6 and 7 excursion was in fact an excursion. Mr. David Kolaz, Manager of the Agency's Ambient Air Quality Monitoring Section, testified that USEPA guidelines specifically state that the measured data is not to be corrected for any measurements of precision or accuracy, either directly corrected or corrected in performing evaluations to determine attainment of a standard. (R. p. 33). Though a monitor that is consistently taking faulty readings should be removed from the State's monitoring system, Alton has not provided any information to the Board that would demonstrate that the Barton School monitor which recorded the November, 1984 excursions was consistently taking faulty readings.

Alton also argues that the November 6 and 7 reading of 0.148 ppm. was 5% too high; the actual reading being 0.141 ppm. Alton contends that such a tenuous and de minimus number would not seem to be a proper basis on which to deny a permit, though Alton never acknowledges the contrary position that the November 6 and 7 reading was 9% too low. Alton's contention is seriously misplaced. Under the current federal and state air pollution control scheme, an area is either designated as attainment

or non-attainment for criteria pollutants based on the best available information. This information includes the data obtained form the State's ambient air quality monitors. Once an area is designated as non-attainment, regardless of the degree of the non-attainment, major consequences flow. These consequences include the requirement that all existing major sources in the area install state-of-the-art pollution control technology, an increased demand for state and federal resources to correct the problem and an increased risk of having sanctions imposed on the area which may include construction bans on new sources and the loss of millions of dollars in federal funding. These are hardly de minimus consequences. Lastly, the determination of attainment or non-attainment is ultimately made by the USEPA using its guidelines. In view of these consequences, the Board cannot lightly dismiss the testimony that USEPA guidelines place the recorded values as a violation of the primary SO_2 24-hour standard.

The Board also concludes that based on the information received from the excursion study, the Agency could reasonably conclude that Alton's boilers may cause a violation of 35 Ill. Adm. Code 201.141 and 243.122(a) (2). While Alton questions the predictive capacity of the Agency's excursion study, it offers no data to suggest that the Agency's conclusions were unreasonable.

Alton's position in this permit appeal is misdirected. In this permit appeal, the burden is not on the Agency to prove that a violation will occur in the future. Rather, the burden is on Alton to prove that a violation will not occur in the future. Alton has not provided the Board with any information which would enable the Board to conclude that a violation of the primary SO_2 24-hour standard will not occur in the future. Based on the record before the Agency, the Board finds that the information provided by Alton to the Agency fails to demonstrate that issuing a permit for Alton's mill will not cause a violation of the Act

and Board regulations. Therefore, the Board affirms the Agency's denial of a permit for Alton's mill.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby affirms the Agency's denial of an operating permit for Alton's mill located at Alton Packaging Corporation's facility in Alton, Illinois.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 24th day of April, 1986 by a vote of 7 – 0.

/s/ Dorothy M. Gunn

DOROTHY M. GUNN, Clerk
Illinois Pollution Control Board

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th of July, 1988, within 90 days of the April 7, 1988 Order of the Supreme Court of the State of Illinois, as required by 28 U.S.C. § 2101(c), copies of the attached Petition for a Writ of Certiorari were filed with the Clerk of the United States Supreme Court by being placed in envelopes properly addressed to the Clerk and to all the persons entitled to notice including the Illinois Attorney General, at the following address:

TO: James L. Morgan, Esquire
Assistant Attorney General of
the State of Illinois
Office of the Attorney General
500 South Second Street
Springfield, Illinois 62706

with proper first-class postage prepaid and deposited in a United States mail depository in Chicago.

DANIEL F. O'CONNELL
An Attorney for Petitioner

(2)

FILED
SEP 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1987

ALTON PACKAGING CORPORATION,

Petitioner,

v.

POLLUTION CONTROL BOARD

and

ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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POLLUTION CONTROL BOARD and
ENVIRONMENTAL PROTECTION AGENCY

September 12, 1988

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

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No. 88-259

IN THE

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OCTOBER TERM, A.D., 1987

ALTON PACKAGING CORPORATION,

Petitioner,

v.

POLLUTION CONTROL BOARD

and

ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OF THE CASE

The statement of the case submitted by Alton Packaging Corporation ("Alton") fails to comply with Supreme Court Rule 21.1(h). Alton's statement of the case also fails to provide the Court with an accurate description of the course Alton's application followed in the permit review process.

A. Noncompliance with Supreme Court Rule 21.1(h)

Supreme Court Rule 21.1(h) required Alton to specify, in its statement of the case,

> "The stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears *** as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Alton did not inform this Court that it raised the question presented in its petition for the first time in its petition for rehearing before the Fifth District Court of Appeals ("Fifth District").

B. The permit review process

In this case, Alton submitted its application to the Illinois Environmental Protection Agency ("Agency") to renew the operating permits for Boilers 6 and 7 shortly before the Pollution Control Board ("Board") amended the regulation governing sulfur dioxide emissions from emission sources, such as those for which Alton was seeking a permit, to reduce the allowable level of emissions. In response to the amendment of this regulation, Alton filed petitions for a variance and a site-specific rule in order to obtain a higher emission level (5th District opinion, petitioner's appendix, p. c-2). In submitting its renewal application, Alton had elected to rely on the data submitted with its prior permit applications to support its pending application — data which would be relevant only in evaluating compliance with the old sulfur dioxide standard and not the new standard. Accordingly,

> "Alton waived the 90-day decision period until the Board issued a final order in PCB 83-55 (site-specific rule) and PCB 83-49 (variance)." (*Alton Packaging Corp. v. Environmental Protection Agency*, PCB 85-145 (April 24, 1986), hereafter "Board opinion," petitioner's appendix, p. e-2.)

Alton did not attempt to supplement its pending permit application with information relevant to the regulatory change or with information developed during the variance and site-specific rule proceedings.

During the waiver period the Agency continued to monitor Alton's operation of Boilers 6 and 7. In November of 1984 the Agency's ambient sulfur dioxide monitor in the vicinity of Alton's plant recorded two excursions from the primary sulfur dioxide 24-hour standard (two excursions of this standard within one year constitute a violation).

> "The Agency conducted an excursion study to determine the major contributor(s) to the violation. The excursion study determined that Alton's Boilers 6 and 7 appear to have been the major contributors to the violation. Thus, the Agency concluded that Boilers 6 and 7 may cause violations of 35 Ill. Adm. Code 201.141 and 243.122 in the future ***" (Board opinion, petitioner's appendix, p. e-3).

Since the waiver of the permit decision deadline was still in effect because the variance and site-specific rule proceedings were still pending, the Agency did not act immediately to deny the pending renewal application when it determined that Alton was the major contributor to the air quality violation (the Agency did commence an enforcement investigation into the matter which included sending the July 22, 1985 compliance inquiry letter referred to at page 13 of Alton's brief).

On August 1, 1985 the Board dismissed the variance and site-specific rule proceedings for want of prosecution. (*Alton Packaging Corp. v. Pollution Control Board* (1986), 146 Ill. App. 3d 1090, 497 N.E.2d 864.) In the wake of this ruling, Alton did not contact the Agency to request an extension of the permit decision waiver. Thus, on August 27, 1985, the Agency issued its denial of Alton's permit application. The reasons for denial were:

"1. Based upon information submitted to the Agency, Boilers 6 and 7 presently emit sulfur dioxide at the average rate of

4.9 lbs. per million BTU, an amount in excess of the applicable emission limit of 1.8 lbs. per million BTU of 35 Ill. Adm. Code 214.141.

2. The Agency's ambient SO_2 [sulfur dioxide] monitor in Alton recorded a violation of the primary 24-hour SO_2 standard during 1984. Based upon a recent study performed by the Agency, Boilers 6 and 7 appear to have been the major contributor to this violation. Boilers 6 and 7 thus may cause violations of 35 Ill. Adm. Code 201.141 and 243.122(a)(2)." (Board opinion, petitioner's appendix, p. e-2, with corrections.)

The first basis for denial was mooted during the appeal of the dismissal of the variance and site-specific rule proceedings. (Board opinion, petitioner's appendix, p. e-3.)

In the hearing before the Board, Alton mounted a vigorous challenge to the Agency's permit denial decision. By calling key Agency personnel who participated in the permit decision as adverse witnesses, Alton subjected the basis for the Agency's decision to intensive scrutiny. As the Board noted:

> "Alton supports its position by questioning the accuracy of the recorded excursion on November 6 and 7. Alton contends that the November 6 and 7 excursion was not an excursion because the range of accuracy of the monitored readings could range, based on a 95% confidence interval, anywhere from 9% too low to 5% too high. Furthermore, Alton contends that the November 6 and 7 excursion may have been lower since the precision check of the monitor before the recorded excursion indicated that the recorded sample was 5.5% higher than what the real value was. Lastly, Alton contends that the Agency's excursion study was not predictive of the future and, consequently, the Agency could not determine whether the operation of Alton's boilers would in the future cause a violation of the primary SO_2 24-hour standard. (Pet. Brief pp. 7-10)" (Board opinion, petitioner's appendix, pp. e-3 to e-4.)

After reviewing the record developed before the Agency and at the hearing, the Board concluded that:

> "[b]ased on the record before the Agency, the Board finds that the information provided by Alton to the Agency fails to demonstrate that issuing a permit for Alton's mill will not cause a violation of the Act and Board regulations. Therefore, the Board affirms the Agency's denial of a permit for Alton's mill." (Board opinion, petitioner's appendix, p. e-6 to e-7.)

The Fifth District affirmed the Board's decision and the Illinois Supreme Court denied Alton's petition for leave to appeal.

By exercising its right to a hearing before the Board, its prior operating permit remained in effect until the Board had ruled on the appeal (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b)). Alton did not move for a stay of the decision of either the Board or the Fifth District.

SUMMARY OF ARGUMENT

Alton's due process challenge to the denial of its operating permit is both untimely and unfounded. Alton did not raise its due process challenge to the permit denial process until its petition for rehearing before the Fifth District. Alton has, therefore, waived any right to raise this issue before this Court. Furthermore, the mechanism provided by the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1001, *et seq.*) for the review of permit denials provided Alton with all of the process it was due. Alton's petition for writ of certiorari should, therefore, be denied.

ARGUMENT

A. Alton Waived Its Opportunity To Assert Its Due Process Challenge.

Alton did not raise any due process objections to the permit denial mechanism under the Environmental Protection Act until its petition for rehearing before the Fifth District. By failing to raise this objection at the hearing before the Board or in its initial brief to the Fifth District, Alton waived any due process objection it may have had.

Illinois Supreme Court Rule 341(e) (Ill. Rev. Stat. 1987, ch. 110A, Rule 341(e)) governs the content of briefs on appeal and provides that:

"(7) *** Points not argued [in the initial brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Thus, by not raising its due process objection in its initial brief to the Fifth District, Alton waived that objection. See *Board of Education of Arbor Park School District No. 145, Cook County v. Ballwebber* (1983), 96 Ill. 2d 520, 525, 451 N.E.2d 858, 862; *County of Cook v. Priester* (1976), 62 Ill. 2d 357, 370, 342 N.E.2d 41, 48. Accordingly, Alton's petition should be denied.

B. No Hearing Was Required Before The Agency Because The Agency's Determination Was Only A Preliminary Step And Was Not The Final Agency Action.

It is a fundamental tenet of procedural due process that a hearing is not required at a preliminary stage of an administrative proceeding so long as a hearing is available before the administrative action is final. In this case, the Agency's determination that the permit should be denied is only a preliminary step. Thus, no hearing was required.

1. The permit review process provides ample opportunity for an applicant to make its case and a denial does not become final until the Board issues a decision.

Under the Environmental Protection Act the permit applicant plays a vital role in determining both the scope of the information reviewed in the processing of its application and the scope of the review the application receives. The permit review process commences with the applicant's preparation and submission of the permit application. In addition to the information required by regulation (35 Ill. Adm. Code 201.157 (1985)), the applicant is free to submit all other information it deems necessary to justify issuance of the permit (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a)). Even though a period of five years may pass between applications, the applicant may (as Alton did in this case) choose to rely on the data submitted with its previous application provided it certifies that it "remains true, correct and current." (35 Ill. Adm. Code 201.157 (1985).)

After submission of the permit application, the Agency commences its evaluation of the application. The Agency reviews the supporting materials submitted by the applicant but also collects and reviews other information relevant to the permit determination. Where the application under review is for the renewal of an existing operating permit, the additional information gathered by the Agency can include information about how the facility has actually performed while in operation, including whether it has been involved in any violations of the Environmental Protection Act.

Section 39(a) of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a)) requires the Agency to complete its investigation and issue its decision within 90 days of the filing of the application. The applicant may, of course, waive this deadline for a specified period or, as was done in this case, until a specific event occurs. When the Agency does issue its decision, if it is denying the application, it must provide the applicant with "specific, detailed statements as to the reason

the permit application was denied." (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a).) The Environmental Protection Act does not require that the Agency provide the applicant with notice that it intends to issue a decision.

When the Agency has denied a permit, the permit applicant then determines how the matter will proceed from there. The applicant may choose to revise its permit application to address the concerns set forth in the Agency's denial notice and resubmit it. The applicant may also choose to exercise its right to a hearing to challenge the basis for the Agency's decision and petition the Board for a hearing to contest the Agency's decision.

When the applicant elects to proceed before the Board, "it is the Board, not the Agency, which must determine whether a permit should issue." (*Environmental Protection Agency v. Pollution Control Board* (1986), 115 Ill. 2d 65, 68, 503 N.E.2d 343, 344.) Section 40(d) of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1040(d)) limits this hearing to a review of "the record before the Agency." The purpose of this limitation is twofold. First, it protects the integrity of the permit decision by preventing an applicant from circumventing detailed review of a permit application by the Agency through the submission of evidence which, in essence, constitutes a new permit application. Second, it protects the applicant by preventing the Agency from relying on material it did not originally consider in support of its denial decision. As the Fifth District noted, this review is done by "means of cross-examination and the receipt of testimony 'to test the validity of the information [relied on by the Agency]' ***" (citation omitted, *Alton Packaging Corp. v. Pollution Control Board and Environmental Protection Agency* (5th Dist. 1987), 162 Ill. App. 3d 731, 501 N.E.2d 275), petitioner's appendix, p. c-9).

Where an applicant is seeking the renewal of a prior operating permit, the prior permit remains in force until the Board reaches a final decision on the matter. Section 16(b) of the

Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b)) provides that:

> "[W]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of the reviewing court."

This provision of the Administrative Procedure Act applies because the Environmental Protection Act did not address this issue. (*See* Ill. Rev. Stat. 1987, ch. 127, par. 1002(a).) At this stage of the process the applicant may also waive the 90-day decision deadline and take as much time as necessary to prepare its case.

If the permit denial is upheld by the Board, the applicant may move the Board or the appellate court to stay the effect of that decision (35 Ill. Adm. Code 101.140 (1985) and Illinois Supreme Court Rule 335(g) (Ill. Rev. Stat. 1987, ch. 110A, Rule 335(g), respectively).

Under the Environmental Protection Act, an applicant has ample opportunity to both make its own case and to rebut any contrary evidence relied on by the Agency. Due process does not require anymore.

2. No opportunity for a hearing before the Agency was required.

As this Court has stated,

> "[a]t times a preliminary decision by an agency is a step in an administrative proceeding. We have repeatedly held that no hearing is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. See *Lichter v. United States*, 334 U.S. 742, 68 S. Ct. 1294; *Inland Empire Council v. Millis*, 325 U.S. 697, 65 S. Ct. 1316; *Opp Cotton Mills v. Administrator of Wage & Hour Division of Department of Labor*, 312 U.S. 126, 61 S. Ct. 524."

Ewing v. Mytinger & Casselberry, Inc. (1950), 339 U.S. 594, 598, 70 S. Ct. 870, 872. In that case, the court determined that an administrative finding of probable cause that an article had been misbranded in violation of section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)) was only a preliminary step in the initiation of a lawsuit to seize the misbranded articles (this determination of probable cause had been based solely on evidence gathered by the agency itself). Thus, no hearing was required prior to the finding of probable cause because a hearing would be provided prior to the administrative action becoming final.

The Agency determination in this case is just such a preliminary step. As the court noted in *Environmental Protection Agency v. Pollution Control Board* (3rd Dist. 1985), 138 Ill. App. 3d 550, 557, 486 N.E.2d 293, 294,

> "[i]n a permit case, such as this, the process involving the [Agency] and the [Board] is an administrative continuum. It became complete only after the [Board] had ruled."

The Board could issue its ruling only after the applicant has been provided an opportunity for a hearing. At that hearing the Board, unfettered by the prior Agency decision, would review the record developed by the applicant in its application and by the Agency in its review of the application together with such additional evidence and testimony as would be relevant to the applicant's challenge of any contrary evidence relied on by the Agency. *Environmental Protection Agency v. Pollution Control Board, supra,* 138 Ill. App. 3d at 551-52, 486 N.E.2d at 294.

During the pendency of this review, the applicant's prior operating permit would continue in effect. (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b).) For this reason, the present case is distinguishable from the case of *Martell v. Mauzy* (N.D. Ill. 1981), 511 F. Supp. 729. In that case, the Agency had issued Martell a developmental permit for construction of a waste disposal facility. An operating permit would then issue once the applicant's engineer and the Agency certified that the construction permit had been complied with.

> "Since all information required for the operating permit (other than the engineer's certification and the Agency inspection) is submitted with the development permit application, the issuance of a development permit by the Agency was tantamount to the issuance of an operating permit ***."

Martell v. Mauzy, supra, 511 F. Supp. at 733. The Agency, however, denied the operating permit despite satisfactory engineer and Agency certifications, relying instead on information not included in or reviewed under the developmental permit application. The action by the Agency was more in the nature of a permit revocation than a permit denial, because of the unique circumstances involved. "As a result of the denial of the operating permit, [the applicant] has been forced to virtually close its doors." *Martell v. Mauzy, supra*, 511 F. Supp. at 736. In that situation, the court determined that the operating permit should have issued and remained in effect until the applicant had an opportunity to be heard before the Agency was required. In this case, there would be no deprivation because the prior operating permit remained in effect until after Alton could be heard on the Agency's determination.

The Agency's position in the permit process under the Environmental Protection Act is analogous to that of the United States Fish and Wildlife Service ("USFWS") in the case of *Zabel v. Tabb* (5th Cir. 1970), 430 F. 2d 199. That case involved the review of a permit application by the U.S. Army Corps of Engineers ("the Corps") under Section 10 of the River and Harbors Act of 1899 (33 U.S.C. 403). The Fish and Wildlife Coordination Act (16 U.S.C. 661-666) required that the Corps consult with USFWS during the permit process regarding conservation of wildlife resources (16 U.S.C. 662(a)). This consultation then becomes a part of the record upon which the Corps makes its decision. The applicant is then given an opportunity to rebut the USFWS findings and conclusions before the Corps. In the *Zabel* case, USFWS determined that the proposed project would have an adverse impact on wildlife re-

sources. This was one of the factors relied on by the Corps to deny the permit. The court rejected the applicant's assertion that the lack of a hearing before the USFWS violated due process noting that:

> "[a]dministrative law requires that before an agency can regulate a party, it must allow that party to be heard. Here, [the applicants] were given such a hearing before the Corps of Engineers, the body empowered to grant or deny a permit. They were not entitled to a hearing before the Fish and Wildlife Service because it is not 'the one who decides.' *Morgan v. United States* (1935), 289 U.S. 468, 481, 56 S. Ct. 906, 912. They were allowed to rebut the findings and conclusions of the Fish and Wildlife Service before the deciding body and thus were not denied due process for lack of a hearing."

Zabel v. Tabb, supra, 430 F. 2d at 214-15. Alton was given the same opportunity to rebut the findings and conclusions of the Agency "before the deciding body" — the Board. No hearing was required before the Agency.

C. The Opportunity To Rebut The Evidence Developed By The Agency Afforded Alton By The Hearing Before The Board Was Adequate.

Alton has failed to demonstrate that the opportunity given it to rebut the evidence developed by the Agency was so inadequate as to violate due process. Alton asserts that it was not allowed to submit certain evidence (described only as air dispersion modelling studies) which would have rebutted the Agency's evidence because the Board hearing was "limited to the record before the Agency." The record demonstrates that Alton was given ample opportunity to rebut that evidence and took advantage of it. Due process has, therefore, been satisfied.

At the hearing before the Board, Alton sought to rebut the evidence relied on by the Agency by challenging its accuracy. Alton did so by subjecting the Agency employees involved in the gathering of this evidence to extensive questioning and by

submitting both written and oral arguments. (Board opinion, petitioner's appendix, pp. e-3 to e-4.)

At the hearing before the Board, Alton did not object to the statutory limitation of that proceeding to the scrutiny of the record developed before the Agency. In its brief to the Fifth District, Alton noted that:

> "[t]he parties were well aware of this rule and both sides objected when the other side attempted to present information outside of the Agency record." (Alton brief, case #5-86-0477, p. 30.)

It was only in the wake of the Board's decision that Alton determined additional evidence should have been admitted. By waiting until that time to assert additional evidence was relevant, Alton has waived its opportunity to submit that evidence. Furthermore, it is questionable whether any of the subject evidence would be relevant because Alton has not given any indication of how the "air dispersion modelling studies" would rebut any of the evidence relied on by the Agency.

The fact that the Agency acted after Alton's waiver of the decision deadline had expired, without any prior notice to Alton, cannot have prejudiced Alton. Alton asserts that it could not fully prepare its case because the Agency acted on the permit application when it did. This assertion is questionable at best since the Agency acted at exactly the time when action should have been taken — shortly after Alton's waiver of the permit decision deadline had expir ed as a result of the dismissal of variance and site-specific rule proceedings (Board opinion, petitioner's appendix, p. e-3). As with a permit in which the decision deadline has not been waived, the Agency continued to review the application and other relevant information until the time for a decision came — in this case, a time of Alton's own choosing. If Alton felt then that it needed more time to prepare its rebuttal it could have extended the deadline for decision as it had done during the earlier stages of the Agency's review of the application. Alton did not do so. In this light, it is clear that Alton was given ample opportunity to rebut the evidence complied by the Agency. Alton made as much of that opportunity as it then desired. Nothing further is now required.

CONCLUSION

Alton was given all of the process it was due during the review and denial of its permit application by the Agency and the Board. Alton's petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and ILLINOIS POLLUTION CONTROL BOARD

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